

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1435

To be argued by
SARAH S. GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1435

UNITED STATES OF AMERICA,

Appellee,

—v.—

MILLICENT JONES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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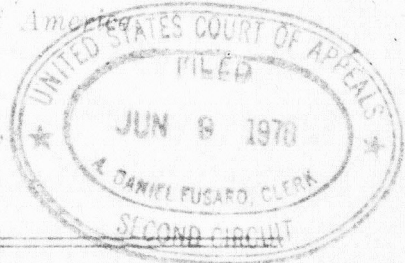


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Preliminary Statement

Millicent Jones appeals from a judgment of conviction entered on September 29, 1977, in the United States District Court for the Southern District of New York, after a four-day jury trial before the Honorable Constance Baker Motley, United States District Judge.

Indictment 77 Cr. 386, filed May 20, 1977, charged Jones and Lavanne Elaine Hammond with conspiring to distribute and to possess with intent to distribute heroin, in violation of Title 21, United States Code, Section 846.

On September 20, 1977, the morning of trial, Hammond made an oral motion to suppress certain physical evidence seized at the time of her arrest. After an evidentiary hearing was conducted on September 20th and 21st, the motion was denied. Trial commenced on September 26, 1977, and continued until September 29, 1977, when the jury found both Jones and Hammond guilty.

On November 15, 1977, Jones was sentenced to a term of imprisonment of one year and one day, and Hammond was sentenced to a term of imprisonment of two years. Execution of both sentences was suspended and the defendants were placed on probation for periods, respectively, of eighteen months and three years.

Statement of Facts

The Government's Case

A. Synopsis

In its direct case, the Government proved by overwhelming evidence, including the testimony of two undercover agents of the Drug Enforcement Administration ("DEA") and lengthy tape recorded conversations, that in April, 1977, Jones and Hammond conspired to possess with intent to distribute and to distribute heroin. The evidence showed that Jones played a principal role in negotiating the sale of one-eighth of a kilogram of heroin to two undercover agents and that Hammond was to be the source of the heroin. The conspiracy ended when DEA agents arrested the defendants without completing the transaction.

B. The Negotiations

On April 14, 1977, Gerald Franciosa, a DEA Special Agent acting in an undercover capacity, was introduced by an informant to the defendant Jones at Jones' apartment on Washington Avenue in the Bronx. (Tr. 27-29).*

* "Tr." refers to the trial transcript; "H" refers to the minutes of the suppression hearing; GX refers to Government exhibits; DX refers to defense exhibits.

Prior to the meeting, the informant had recorded two telephone conversations with Jones, during which arrangements were made for the meeting and for Franciosa's purchase of heroin. In those conversations, Jones told the informant that the defendant Hammond would come to the apartment for the money, depart and give the money to her boyfriend (hereinafter "Hansen"),* who would then obtain the heroin. (Tr. 27, 122-23, 208-09; GX 15).

When Franciosa arrived at Jones' apartment, he and Jones discussed the prices she would charge for heroin and cocaine. Jones told Franciosa that one-eighth of a kilogram of heroin would cost \$7,000 and one-eighth of a kilogram of cocaine would cost \$5,500. Franciosa told Jones that he wanted to purchase heroin. Jones said her source would be arriving soon. (Tr. 28-29).

Shortly thereafter, Hammond arrived at Jones' apartment in a rented yellow Ford.** Hammond confirmed that

* Defendant Hammond's boyfriend or husband, as he was alternately referred to during the trial, was identified as Basil Hansen. Hansen, named by the Government as an unindicted co-conspirator (H. 17), was a convicted narcotics dealer, see *United States v. Taylor*, 75 Cr. 1112, who escaped from the Metropolitan Correctional Center on April 11, 1976. At the time of the instant trial, Hansen was a fugitive with outstanding warrants for his federal narcotics conviction, escape and a New York State murder indictment. In February, 1978, Hansen was apprehended. On April 4, 1978, the Honorable Kevin T. Duffy, United States District Judge, sentenced Hansen to a term of imprisonment of 60 years on the narcotics conviction.

During the investigation which led to the arrest of Jones and Hammond, some of the agents in the group investigating the case tentatively identified Basil Hansen from an old photograph. It was not, however, until after April 27, 1977, that the agent in charge of the investigation positively identified Hansen from a surveillance photograph.

** Two surveillance officers, who were stationed on the street outside of Jones' apartment, observed Hammond's arrival. (Tr. 247, 267, 270-71, 273).

Asian white heroin would cost \$7,000 per eighth of a kilogram and told Franciosa she wanted the money in advance. Hammond stated she would then get the heroin from her husband, who was waiting downstairs. Franciosa refused to "front" the money and asked Hammond to bring her husband to the apartment with the heroin. (Tr. 30-31).

Hammond left the apartment and met with co-conspirator Hansen. (Tr. 244-48, 268, 273, 326-27, 330-32, 335). Hammond and Hansen walked out of the area, leaving the yellow Ford rental car on the street. Approximately one-half hour later, Hammond telephoned Jones and told her that Hansen would not come up to the apartment. (Tr. 34).

After the telephone call from Hammond, Jones once again asked Franciosa if he would "front" the money. Franciosa refused and asked Jones to telephone Hammond so that he could speak to Hansen. (Tr. 35). During the course of the evening, Franciosa had two telephone conversations with Hansen, but could not consummate the transaction in view of Hansen's insistence that the \$7,000 be "fronted" to either Hammond or Jones. (Tr. 41-42).*

The next evening, April 15, 1977, Franciosa returned to Jones' apartment. Jones told him the heroin would be brought to the apartment. Once again there were

* While Franciosa was in Jones' apartment attempting to conclude the sale, an unidentified person came with a man in a blue Ford rental car and retrieved the yellow Ford rental car left on the street earlier in the evening by Hammond. While the surveillance agents were not able to identify the driver, they did follow the car and its driver to a house on DeReimer Avenue in the Bronx. (Tr. 275-77). Apparently, these persons spotted the surveillance, since the yellow Ford rental was returned to Grand Ford Inc. the following day and a new car rented in its place. (Tr. 275-79, 446-51; GX 6A-B).

telephone negotiations for one-eighth of a kilogram of heroin, and once again the deal fell through when Franciosa refused to "front" the entire \$7,000. (Tr. 43-46, 249-52, 279-80). On April 18, 1977, Franciosa had a lengthy recorded telephone conversation with Jones in which they discussed how the purchase of heroin would proceed. (Tr. 47-49; GX 1, 1A). Finally, on April 26, 1977, Franciosa agreed, in a telephone conversation with Jones, to "front" the \$7,000. (Tr. 63). The exchange of the heroin and the money was scheduled for the next day.

On April 27, 1977, Franciosa telephoned Jones and told her that he had the \$7,000. Jones told him she would call Hammond to see whether she and Hammond would bring the heroin to Franciosa or whether Franciosa should come to Jones' apartment to get it. (Tr. 63-64; GX 2 2A). After contacting Hammond, Jones told Franciosa that the heroin would be delivered in the manner previously discussed in their April 18, 1977, telephone conversation; that is, Franciosa would come to Jones' apartment and wait with her children, while Jones took the money and returned with the package of heroin. (Tr. 63-64; GX 1, 1A, 2, 2A).

After the telephone conversation with Jones, Franciosa, together with another undercover agent wearing a kel transmitter, went to Jones' apartment. The agents counted out the \$7,000 and gave it to Jones. Jones then received a telephone call from Hansen. She told Hansen that she had the money and that he could come pick it up. (Tr. 75-77, 255-56; GX 5, 5A-D). Franciosa also spoke to Hansen to reassure him about the deal. While the agents awaited Hansen's arrival, Jones told them that Hammond had taught her how to make money by cutting and wrapping heroin. Jones said that Hammond herself wrapped three kilos of heroin a day. (Tr. 76-79, 257; GX 5, 5A-D). Eventually, Jones received another telephone call from Hansen. After the telephone call,

Jones took the \$7,000, left the apartment, and met with Hansen outside the building. (Tr. 283).^{*} Jones then returned to the apartment with the money, telling the agents that Hansen was going to get the heroin and would call later. (Tr. 81).

Meanwhile, Hansen entered a gypsy cab and was followed across the Bronx by the surveillance cars as well as the helicopter. Despite the extensive surveillance, Hansen evaded the agents. (Tr. 281, 284-85). Some time thereafter, Hansen telephoned Jones and told her that he had spotted police surveillance and the helicopter. Hansen threatened to kill Jones for setting him up. Jones returned the \$7,000 to the agents, who then left the apartment. (Tr. 81-82, 259.)

C. The Arrests of Hammond and Jones and Search for Hansen

On May 3, 1977, two surveillance agents saw Hammond enter and exit the DeReimer Avenue house.^{**} They also saw Basil Hansen entering the House.^{***} When they saw Hansen, the agents called for assistance and notified the Federal Bureau of Investigation (FBI). (Tr. 344). When back-up agents arrived, they were deployed both to the rear and to the front of the house. Agents knocked

^{*} Jones and Hansen were observed by agents conducting surveillance in four cars and a helicopter. (Tr. 281).

^{**} During this period, Hammond's father was seen leaving the house, as well as two other men—one of whom was a fugitive—who were arrested a few blocks from the house with a loaded gun and \$5,000 in cash. (H. 42-43, 75-76; Tr. 345-46, 351).

^{***} This occasion was the first time since making a positive identification that the agents had seen Hansen. It was only through a surveillance photograph taken on April 27 outside the DeReimer Avenue house that the agent in charge of the investigation became certain of Hansen's identity. (H. 61; Tr. 330-32).

on the door. After approximately five minutes, Hammond came to the second story window, and then downstairs to open the door. (H. 43-44; Tr. 311-12). The agents told Hammond they were searching for a fugitive and showed her a photograph of Hansen, whom she denied knowing. She then remained in the kitchen area with her son and two agents, while other agents searched the house. The sportcoat which Hansen had been wearing when he entered the house was found in an upstairs bedroom. Inside the coat were a set of keys and a New York State driver's license in the name of Dennis Williams. The driver's license had Hansen's photograph on it. (H. 45; Tr. 353). Hansen was not found.

Hammond was then placed under arrest by Special Agent Greenan for her role in the narcotics conspiracy and advised of her constitutional rights. (H. 46; Tr. 378-81). On the kitchen table, one or two feet away from Hammond, was an open pocketbook. Agent Greenan looked in the pocketbook for a weapon. At that time, he saw a number of leases and a driver's license. Hammond was then questioned about Basil Hansen. She was shown the driver's license which had been found in Hansen's jacket and questioned about the contents of her pocketbook, including a New York State driver's license in the name Yolanda Williams and leases for different apartments in the Bronx under various names. (H. 47-48; Tr. 381-82).^{*} Hammond was then taken to Drug Enforcement Administration headquarters.

While two agents remained inside the house and two remained outside the house awaiting Hansen's possible

^{*} One of the leases found in Hammond's pocketbook was for the DeReimer Avenue house. It was leased under the names Ronald and Elaine Hobson. That lease and the original held by the real estate company were introduced into evidence at trial. The real estate agent identified Hammond as the leasee. (Tr. 439-41; GX 7A-B).

return, other agents left to search for Hansen using the leads found in Hammond's pocketbook. (H. 47-48; 50-51). After some time, the agents on surveillance outside the house observed a Ford rental car occupied by two men coming down DeReimer Avenue.* The car stopped in front of the DeReimer Avenue house. One of the men exited the car, walked to the front gate of the house and stood there motioning upwards. (H. 51-52). One of the agents inside the house saw a person run across the yard. The Ford then left the area. (H. 51-52). The agents at the house then radioed to the agents searching for Hansen and told them to return to the house. (H. 96-97).

When the agents returned to DeReimer Avenue, they discussed the evening's events. Since the prior search of the house for Hansen had uncovered a number of books on carpentry, a lumber receipt, and numerous tools in the basement, Franciosa thought that a secret compartment of some type had been built and that the men in the Ford had returned either for a stash of narcotics or for Hansen himself. (H. 53-55). Since the agents had seen Hansen enter but not leave the house, they decided that Hansen might still be inside. Therefore, the search was renewed. (H. 57-58). Franciosa went upstairs with his gun drawn. In the master bedroom, he saw an open window and, inside the closet, an open trap door with a light shining.** Looking into the opening, Franciosa saw and removed numerous articles of men's clothing, several pieces of identification, boxes of glassine envelopes, measuring spoons and a package of white powder, later found to be a quinine and sugar mixture. (H. 59-60,

* The car was the same one seen on April 14 by surveillance agents outside Jones' apartment on Washington Avenue. (H. 97).

** Agent Greenan testified that he had not seen a trap door in his search of the bedroom and closet area earlier that evening. (H. 59).

93-94, 107-08). The package of white powder and two photographs of the trapdoor were introduced into evidence at trial. (Tr. 107-08, 433; GX 8, 4A-B).*

After leaving the DeReimer Avenue house, the agents went to Washington Avenue where they arrested Jones. (Tr. 359).

The Defense Case

The defendants sought to prove that the agents, desperate to capture Basil Hansen, invented the narcotics conspiracy case as an afterthought, presumably in an attempt to get Hansen.** In support of this contention, Jones called a DEA agent and an employee from the Metropolitan Correctional Center (MCC) as witnesses. The employee testified that the remand form for Hammond, filled out by the DEA agent who brought Hammond to the MCC to be lodged on the evening of her arrest, indicated that the charge against her was "harboring a fugitive."*** (Tr. 468-69; DX A). The Dea

* The package of quinine and sugar, the photographs, the driver's license and lease found in Hammond's pocketbook were the subjects of Hammond's motion to suppress.

** The defense theory was somewhat difficult to follow, since the defendants advanced two totally inconsistent arguments: First, that the facts as proven in the Government's case were invented by the agents as an afterthought and second, that the facts were all true, but that the conspiracy's objective was a "rip-off" and not a narcotics transfer.

*** Agent Greenan testified that he had arrested Hammond on the charge of conspiracy to violate the federal narcotics laws, that he had so advised her at the time of arrest, and that he had obtained prior authorization from the United States Attorney's office to do so. (Tr. 381, 395-96). The following day, Hammond was advised by an Assistant United States Attorney that she was being charged with engaging in a narcotics conspiracy and a complaint specifying that charge was filed. (Tr. 410-12). Agent Greenan further testified that the agent who had taken Hammond to the MCC to be lodged was not a member of the group inves-

[Footnote continued on following page]

agent testified that on April 20, 1977, he had identified a photograph of Basil Hansen as the man he had seen while on surveillance on April 15, 1977. (Tr. 438-43). From this testimony, the defendants argued that if the agents' testimony were true, Hansen could have and should have been arrested at least by April 27th.

ARGUMENT

The District Court's Conspiracy Charge Was Proper.

Prior to enumerating the elements of the crime of conspiracy in its charge, the District Court briefly explained to the jury that a conspiracy to commit a crime was an offense separate from the substantive violation and further explained the purpose for a separate conspiracy statute. Judge Motley charged:

"Now, what is a conspiracy?

A conspiracy is a collective criminal agreement, a partnership in crime. A conspiracy presents a greater potential threat to government and society than acts committed by a lone wrongdoer. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those of an individual acting alone to accomplish.

Moreover, a group association increases the likelihood that the criminal objective will be suc-

tigating the narcotics case, was not familiar with the narcotics case, was not present when Hammond was placed under arrest, and had been called in specifically to aid in the arrest of the fugitive Hansen. Thus, it was clear that the agent who lodged Hammond at the MCC was familiar only with DEA's efforts to locate Hansen and had, therefore, assumed that Hammond was being charged with harboring the fugitive Hansen.

cessfully realized and renders detection more difficult than in the instance of the lone wrongdoer.

It is because of these and other reasons that Congress has made conspiracy or concerted action to violate the federal law a separate and entirely distinct crime from the substantive crime which may be the objective of the conspiracy." (Tr. 609-10).

Jones' sole claim on appeal is that this portion of the court's charge was "irrelevant," "inflammatory" and so "highly prejudicial" (Br. 9) that it requires reversal of her conviction. This contention is wholly without merit.

It has long been the law that the trial court has the responsibility to assist the jury in understanding the evidence. See *Quercia v. United States*, 289 U.S. 466, 469 (1933); *United States v. Lozaw*, 427 F.2d 911, 916 (2d Cir. 1970). In fulfilling this responsibility, there is nothing improper about the District Court explaining to the jury the purpose of the statute they are considering. As long as the instruction is correct, there is no reason to believe that such a charge could be prejudicial; the charge simply helps to explain to the jury the reason for a particular law.

Such an explanation is particularly relevant, helpful and appropriate in cases in which jurors are confronted with the frequently performed but nonetheless formidable task of evaluating the evidence presented at trial against an often elusive, legal concept such as conspiracy. As Judge Motley reasoned in rejecting Jones' objection to the charge:

"[I]t is a charge that is usually, normally given. I think that laymen are amazed sometimes to find that there is a separate crime of conspiracy. I have had experiences of having to reread that charge to many juries. It is a difficult concept for

laymen, and I think most lawyers and there is a lot of objection to this kind of language, but I personally think it is helpful for the jurors to understand that conspiracy is a separate and distinct crime and to understand why the Congress has deemed it appropriate to make it a separate and distinct crime." (Tr. 512).

Moreover, in addition to being a helpful and appropriate instruction in all conspiracy cases, the challenged instruction was specifically appropriate in the instant case in view of the defendants' repeated emphasis on the Government's failure to prove facts which, while essential to a conviction for a substantive offense, were not necessary to prove this conspiracy. Thus, both defense counsel stressed in their opening statements that the Government would not introduce any physical evidence of narcotics. Counsel for Jones told the jury:

"You are going to hear conversations using the vernacular for drugs and you are going to hear about extended negotiations. But one thing you are not going to hear about, and you are not going to have any evidence on, is some heroin being introduced, either samples or any other heroin of any kind." (Tr. 23).

Counsel for Hammond made a similar observation.

"Throughout the trial and however long it takes, you will not see any evidence of heroin involved in this case because there isn't any." (Tr. 25).

While counsel for Jones went on to add that the Government did not need physical evidence of heroin to prove a conspiracy, his arguments in summation once again were clearly directed toward the Government's failure to produce any heroin as evidence. Specifically, counsel urged that the absence of heroin during the negotiations

caused even the agents to question whether "anything happened." (Tr. 564).*

Jones now urges that these arguments merely stressed the defense contention that the defendants intended to "rip-off" the agents and that "a drug conspiracy did not exist." (Br. 12). However, given counsel's constant repetition of the "no heroin" theme and the possibility of confusion inherent in it, it was incumbent upon Judge Motley to carefully explain to the jury that the gist of the offense of conspiracy was concerted action and that for a variety of reasons Congress had chosen to make such action criminal without regard to whether the defendants actually attained their illicit objective.**

Jones does not contend that the District Court's charge was legally or factually inaccurate. (Br. 11-12).*** Nor

* Counsel argued:

"I think you can draw some inference from the action of the agents in this case. If all you need is some talk about narcotics and a couple of people coming and talking about how they are going to do some kind of deal, well, they could have arrested them on the 14th, the 15th, the 18th or the 27th. They could have arrested them any time during that period. But, did they do that? No, they didn't do that. The reason they didn't do it is, they hear a lot of this talk all the time, people talking about things, but they don't arrest them because they can't be sure that it really is a heroin conspiracy. So, what they want is, they want to see some drugs because then they have got some proof that really something happened. But here they had no proof anything happened." (Tr. 563-64).

** "The possibility that jurors, as laymen, may misconstrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply." *Kibbe v. Henderson*, 534 F.2d 493, 498 (2d Cir. 1976).

*** Nor could defendant do so. See *United States v. Rabino-witz*, 238 U.S. 83, 88 (1915). Indeed, at the pre-charge conference, counsel for Jones recognized the validity of the charge. In objecting to the proposed charge, counsel for Jones stated:

[Footnote continued on following page]

does Jones cite any authority to support her contention that the District Court erred in giving the challenged instruction.* Rather, Jones contends (1) that "the court's comments authorized the jury to tolerate deficiencies in the Government's proof as endemic to the prosecution of conspiracy" (Br. 9); and (2) that the court's charge, by introducing "extraneous concerns" (Br. 12), "established a setting for the deliberations in which the jury's duty to assess the facts in a calm and reasoned manner was overshadowed by an appeal to the different

"obviously it has been used, has not been reversed that I know of and I doubt that it would be reversed here if your Honor gave it.

. . . I would just urge your Honor not to include it as a matter of your Honor's discretion. (Tr. 511-12) (Emphasis added).

* Jones suggests that the charge given by Judge Motley was "subjected to mild criticism" in *United States v. Lozaw, supra*. (Br. 10). Even a cursory reading of that case refutes Jones' contention. In *United States v. Lozaw, supra*, the defendant cited as error the District Court's charge to the jury that a conspiracy was more dangerous to the public than the substantive offense itself. Defendant further argued that it was error for the District Court to give a descriptive factual example of a conspiracy to the jury. This Court addressed itself exclusively to the second assignment of error, and it was in that context that this Court urged "stylistic caution and verbal restraint." *United States v. Lozaw, supra*, 427 F.2d at 916. (Br. 10).

Jones also relies upon *United States v. Hill*, 417 F.2d 279 (5th Cir. 1969) and *United States v. Linn*, 438 F.2d 456 (10th Cir. 1971). That reliance is misplaced. In *Hill*, a tax case, the District Court had instructed the jurors that in reaching their decision they had a choice of voting either for the kind of government they wanted in their area of the State or for anarchy. Reversing the conviction, the Fifth Circuit found the instruction to be totally unrelated to the facts, the law, and the charge against the defendant. In *Linn*, an assault case, the District Court refused to give a jury instruction on self-defense requested by the defendant. The Tenth Circuit affirmed, finding no factual basis for the instruction.

obligation to safeguard the community" (Br. 9) and led the jury "to a position necessarily sympathetic to the Government." (Br. 13). The speculative impact attributed to the challenged instruction by Jones, however, can only be urged by failing to examine Judge Motley's charge *in toto*. Given that fundamental error in Jones' analysis," * her contentions must fail.

First, the District Court's charge clearly did not authorize "the jury to tolerate deficiencies in the Government's proof." (Br. 9). While the challenged instruction did tell the jury that "group association . . . makes detection more difficult" (Tr. 609), it in no way suggested that the difficulties of detection relaxed the Government's burden of proof or justified a failure to meet that burden. Thus, prior to giving the challenged instruction, the District Court cautioned the jury:

"The government has the burden of proof proving beyond a reasonable doubt, to your satisfaction, the precise charge which means it must prove each and every element of the crime before a defendant can be found guilty of a crime.

If, in your view, the Government has failed to prove any one of the elements of the crime of conspiracy as to a particular defendant, then you must acquit that defendant." (Tr. 607).

Immediately after giving the challenged instruction, Judge Motley instructed the jury on the elements of conspiracy, explicitly stating that to convict

* It is well settled that the trial court's charge should be read as a whole. *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977); *United States v. Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); see generally, *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). In fact, Judge Motley so instructed the jury. (Tr. 593).

"you must find that the Government has established beyond a reasonable doubt *each* of the following four *essential* elements of the crime of conspiracy. . . ." (Tr. 610) (emphasis added).*

Moreover, the District Court explicitly instructed the jury that the Government was required to prove that the purpose of the conspiracy—which defendants had vigorously contested—was to possess with intent to distribute or to distribute narcotics:

"The Government must prove . . . that it was a purpose of the conspiracy either to distribute a narcotic drug controlled substance or to possess with intent to distribute a narcotic drug controlled substance or both without any lawful authority for doing so." (Tr. 616).

Finally, the District Court told the jury that a deficiency in the Government's proof with respect to any essential element was not to be tolerated:

"Now, if you find that the Government has failed to prove any one of the four elements of the crime of conspiracy which I have just enumerated and discussed for you as to a particular

* Far from tolerating "deficiencies in the Government's proof", the District Court's charge imposed upon the Government a burden of proof more stringent than that required by law. Thus, the District Court charged that the Government was required to prove an overt act to convict the defendants pursuant to 18 U.S.C. § 846. (Tr. 619-20). While the Government has readily accepted that burden in narcotics conspiracy cases and, in fact, included that element in its requests to charge in this case, "an overt act is not a necessary element of a conspiracy charged under 21 U.S.C. § 846." *United States v. Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975), *cert. denied*, 426 U.S. 970 (1976) quoting from *United States v. Tramunti*, 513 F.2d 1087, 1113 n. 28 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

defendant beyond a reasonable doubt, then you *must* find that defendant not guilty of the charge of conspiracy." (Tr. 621) (emphasis added).

These instructions, as a whole, more than adequately stressed to the jury that the Government was to be stringently held to its burden of proof.

Second, the District Court's charge did not introduce "extraneous concerns" appealing to the jury's passions and leading it "to a position necessarily sympathetic to the Government." (Br. 13). Indeed, Judge Motley commenced her charge by instructing the jury that they were to approach the evidence as neutral arbiters of the facts:

"Now, first of all, as you approach the performance of your function in this case which is to determine the guilt or innocence of each of these defendants separately, please remember that *it is your duty to weigh the evidence calmly and dispassionately without sympathy or prejudice for or against either the defendant or against the Government.*

... the fact [that] the Government is a party here, that the prosecution is brought in the name of the United States of America *entitles it to no greater consideration* than that which is accorded to any other litigant in a lawsuit." (Tr. 591-92) (emphasis added).

Later in the charge, Judge Motley again instructed the jury to focus on the facts, use their common sense and avoid being sidetracked by any appeals to passion:

"Your duty is to decide the disputed issues of fact. In doing so use your logic, your reason and your common sense and do not be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevancy or by

what you consider to be not an appeal to your reason or logic but to mere sentimentality or unthinking passion. I repeat, use your common sense." (Tr. 596).

Finally, in the concluding portion of the charge, the District Court stated:

"Now, the most important part of this case, ladies and gentlemen, is the part which you now as jurors are about to play because it is for you and you alone to decide whether a defendant is guilty or not guilty as to the charge made in this indictment.

I know that you will try the disputed facts which have been presented to you according to the oath which you have taken as jurors.

Now, in that oath you promised that you would well and truly try the issues joined in this case and a true verdict render.

Now, I suggest to you if you follow that oath and try the issues, without combining your thinking with any emotions, you will arrive at a true and just verdict.

It must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, then you will not arrive at a true and just verdict." (Tr. 622).

Thus, the District Court repeatedly emphasized to the jury that its function was "unprejudiced fact assessment." (Br. 13). Far from being "inflammatory" or "highly prejudicial", Judge Motley's instructions were a model of

the dispassionate explanation of law required of the District Court.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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of America.*

SARAH S. GOLD,
HOWARD W. GOLDSTEIN,
*Assistant United States Attorneys,
Of Counsel.*

* Twenty-five minutes after the deliberations began, the jury sent a note requesting, among other things, the "four elements of conspiracy". That note clearly reflected that the jury's attention was properly focused. In responding to the note, Judge Motley reiterated the "four essential elements" of a conspiracy charge without repeating the portion of the charge now challenged by Jones. (Tr. 629-30).

★ U. S. Government Printing Office 1978—

714—059—807

AFFIDAVIT OF MAILING

State of New York)
:
County of New York)

ss.:

SARAH S GOLD being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 9 day of June, 1978
She served a copy of the within Brief
2 copies
by placing the same in a properly postpaid franked
envelope addressed:

Steven Lloyd Barnett, Esq
The legal aid Society
Federal Defenders Services Unit
509 United States Courthouse
Foley Square NYC 10007

And deponent further says that She sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Sarah S Gold

Sworn to before me this

9th day of June, 1978

Alma Hanson

ALMA HANSON
Notary Public, State of New York
No. 41-6763450
Qualified in Queens County
Commission Expires March 30, 1980.